

FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
1998 Biennial Regulatory Review -)	IB Docket No. 98-148
Reform of the International Settlements)	
Policy and Associated Filing Requirements)	
)	
Regulation of International)	CC Docket No. 90-337
Accounting Rates)	

REPLY COMMENTS
OF
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION
("ACTA")

America's Carriers Telecommunication Association ("ACTA")¹ hereby submits its Reply Comments in response to the Notice of Proposed Rulemaking² regarding the Commission's proposed revisions to its International Settlements Policy ("ISP") and associated filing requirements.

I. INTRODUCTION

ACTA strongly supports the over-arching de-regulatory policy goals outlined by the Commission in the NPRM. The Commission is correct to take notice of the fact that many aspects of the ISP, such as proportionate return of inbound traffic, certain reporting requirements and

¹ Founded in 1985, ACTA is a national trade association of over 265 telecommunications service providers and related vendors, many of which are interexchange carriers ("IXCs") that hold Section 214 licenses allowing them to provide a full range of facilities-based and resold international services for voice and data communications. Accordingly, ACTA's members have vital interests at stake in this proceeding.

² *1998 Biennial Regulatory Review - Reform of the International Settlements Policy and Associated Filing Requirements and Regulation of International Accounting Rates*, IB Docket No. 98-148, CC Docket No. 90-337, Notice of Proposed Rulemaking, (released August 6, 1998), FCC 98-148 ("NPRM").

uniform rates on parallel routes, harm competition and should be eliminated. ACTA is also relieved to see that the Commission recognizes that reform must proceed cautiously to ensure that large carriers that exercise market power do not exploit liberalization regulations for anti-competitive purposes. NPRM at ¶ 15.

As the global telecommunications marketplace slowly advances toward full competition, the Commission must be careful not to rush to destroy regulatory safeguards that, if intelligently amended, help to foster competition. As foreign carriers evolve from state-owned PTTs to privately held monopolies to dominant carriers and finally to non-dominant competitors, the Commission should be careful to avoid performing regulatory surgery with a meat cleaver rather than a scalpel until this transition period has clearly concluded. Wholesale changes to important safeguards such as the first *Flexibility Order*³ and the “No Special Concessions Rule” would harm competition and frustrate international goals of providing consumers with better service and lower prices through open and competitive markets on international routes.

Additionally, ACTA agrees with the commenting parties that urged the Commission to consider all affiliate relationships between foreign and domestic carriers, including non-equity joint ventures, as directly analogous to formal affiliations when the Commission adopts additional competitive safeguards in this proceeding.⁴ Such a de-regulatory framework would be consistent

³ *Flexibility Order*, 11 FCC Rcd. 20,063, 20,082-83 at ¶ 48 (1996) (“*Flexibility Order*”).

⁴ See, e.g., Comments of PrimeTEC International, Inc. at 2, 4-6.

with what the Commission determined in a related proceeding and with Department of Justice recommendations.⁵

Overall, ACTA contends that allowing small carriers to compete in the international long distance market will be a crucial factor in driving rates towards cost. Implementing, or eliminating, rules without being mindful of the effect such actions will have on the viability of small entrants into the international telecommunications marketplace will only guarantee that consumers will have limited options and higher prices offered only by an elite group of large carriers that control more than 25% of the traffic on international routes.

II. ARGUMENT

A. **The Commission Should Not Apply The ISP To Arrangements Between U.S. Carriers and Foreign Carriers in WTO Member Countries That Affect Less Than 25% Of Traffic On A Particular Route.**

ACTA supports the Commission's proposal to eliminate the ISP requirements for arrangements entered into between U.S. carriers and foreign carriers from WTO member countries where such carriers lack market power on the relevant route.⁶ As the Commission recognizes, without market power a carrier cannot effectively whipsaw or successfully discriminate against U.S. carriers.⁷ Accordingly, the ISP is not needed where whipsawing is not a concern.

⁵ See *Foreign Carrier Entry Order*, 11 FCC Rcd. 3873, 3969 at ¶¶ 252, 253 (1995); see also *Flexibility Order*, 11 FCC Rcd. at 20,082-83, ¶ 48.

⁶ NPRM at ¶ 20.

⁷ See, e.g., *Regulation of International Accounting Rates, Fourth Report and Order*, 11 FCC Rcd. 20,063, n.69 (1996).

However, ACTA contends that the Commission must also protect against the anti-competitive conduct of large foreign and U.S. carriers by applying the first *Flexibility Order* safeguard regarding arrangements affecting 25% or more of inbound or outbound traffic on a particular route.⁸ Realistic prohibitions against discriminatory arrangements between carriers that have the ability to harm competition together with filing requirements are necessary if the Commission is serious about promoting full competition in the international telecom arena.

Such an approach is entirely consistent with prior Commission determinations on such matters. In the *Flexibility Order*, the Commission determined that allowing alternative settlement arrangements created a risk of “anti-competitive actions by foreign and U.S. carriers with a significant share of their markets.”⁹ The Commission also determined that the 25% market share safeguard was necessary “to provide a ‘safety net’ for possible unanticipated consequences” such as “dramatic and sudden shifts in return traffic away from a U.S. carrier.”¹⁰ Furthermore, the Commission has specifically found that the “twenty-five percent threshold affords carriers considerable discretion in negotiating alternative arrangements and is high enough to provide carriers the incentive to negotiate alternative arrangements.” *Id.* at 20,082 at ¶ 46.

Here, the Commission should apply the same standards when determining market share between carriers affecting the applicable routes. Similarly, to be consistent with previous Commission reasoning on this issue, it should aggregate traffic of affiliates and non-equity joint

⁸ 11 FCC Rcd. 20,063, 20,081-82 at ¶¶ 44-47 (1996).

⁹ 11 FCC Rcd. at 20,081, ¶ 45.

¹⁰ *Id.* at ¶¶ 44, 45.

venture partners. After all, non-equity joint ventures could “create a risk of anti-competitive conduct that requires regulatory scrutiny.”¹¹ ACTA also concurs with those commenters that rightfully fear that competitive safeguards should not merely be implemented to prevent whipsawing, but to prevent other more creative forms of anti-competitive conduct as well. Both large foreign carriers and large U.S. carriers have the ability to ally themselves and use their combined strength to coerce concessions from entrepreneurial carriers regardless of their country of origin. Accordingly, the *Flexibility Order* safeguards that govern arrangements that affect 25% or more of the traffic on the route in question should apply.

B. Where The ISP Is Eliminated, Filing Requirements Should Be Eliminated.

ACTA supports the Commission’s proposal to amend the Section 43.51 filing requirement and the Section 64.1001 accounting rate filing requirements so that contracts and accounting rate information for arrangements that are not subject to the ISP would not need to be filed with the Commission.¹²

Lifting such filing requirements will help to develop competition in a number of ways. First, eliminating such requirements would reduce transaction costs on small carriers. Second, the Commission’s workload would be eased as well. Third, ending the filing requirements would spur competition by allowing carriers to keep as proprietary the details of their arrangements with foreign

¹¹ *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3939, ¶¶ 252-53.

¹² NPRM at ¶ 26.

carriers. Lastly, ACTA agrees with the Commission's observation that such filing requirements deter U.S. carriers from creating innovative agreements that are pro-competitive.¹³

C. The Commission Should Retain The "No Special Concessions" Rule.

ACTA agrees with commenters who support the preservation of the "No Special Concessions"¹⁴ rule.¹⁵ The Commission seeks comment on how to apply the rule if the Commission declines to apply the ISP on ISR routes.¹⁶ As proposed, the rule would still prohibit exclusive arrangements with a foreign carrier with market power with respect to the interconnection of international facilities, private line provisioning and maintenance, as well as quality of service. ACTA contends that should the Commission decide to eliminate or alter the ISP on ISR routes, it should still retain the rule to the greatest extent practicable.

Similarly, any removal of the ISP should not extend to arrangements involving the acceptance of geographically "groomed" inbound international traffic by the Bell Operating Companies ("BOCs").¹⁷ ACTA agrees with those commenters that assert that grooming arrangements between foreign carriers with market power and the BOCs have the potential to cause

¹³ NPRM at ¶ 21.

¹⁴ 47 C.F.R. § 63.14(a).

¹⁵ See, e.g., Comments of MCI/WorldCom, Inc. at 9-11; see also Comments of PrimeTEC International, Inc. at 8-9.

¹⁶ NPRM at ¶ 40.

¹⁷ NPRM at ¶ 43.

anti-competitive harm and should be prohibited.¹⁸ Alleged gains in efficiency from such arrangements would be comparatively small with no real benefits enjoyed by American consumers.

D. The Commission Should Further Promote The Use Of ISR.

Those members of ACTA that use ISR in foreign markets have found that broader ISR rules have been highly effective when seeking to lower international rates paid by American consumers by circumventing inflated settlement rates. Furthermore, ISR benefits consumers by providing the least expensive avenue for smaller American competitors to enter new markets.

ACTA contends that the Commission's strict ban on ISR on routes that fail to meet the *Foreign Participation Order*¹⁹ criteria prohibits far more arrangements than needed to achieve an otherwise worthy policy goal. ACTA agrees with the Commission's observation that permitting limited ISR on a particular route would place sufficient downward pressure on settlement rates.²⁰ Therefore, ACTA proposes that the Commission should allow ISR for arrangements between carriers that control less than five percent of traffic on disputed routes to a WTO member country.

Lastly, the Commission seeks comment on its tentative conclusion that it not apply any of the reforms proposed to non-WTO countries. ACTA suggests allowing small amounts of ISR into such countries on experimental and case-by-case bases to determine the effect of such policies on settlement rates. The Commission should revise such experimentation rules periodically as needed.

¹⁸ See, e.g., Comments of AT&T Corp. at 33-34; see also Comments of MCI/WorldCom at 10.

¹⁹ 12 FCC Rcd. 23,891, 23,930-31 at ¶ 85 (1997).

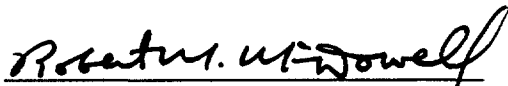
²⁰ NRPM at ¶ 38.

III. CONCLUSION

For the foregoing reasons, ACTA respectfully requests the Commission to: 1) retain the *Flexibility Order* safeguard regulating arrangements that affect 25% or more of inbound or outbound traffic on a particular route; 2) assess a carrier's market share in the aggregate with all of the affiliates and non-equity joint venture partners when determining whether the carrier controls 50% of a foreign market or 25% or more of the inbound or outbound traffic on a route; 3) keep the "No Special Concessions" rule when practicable for all terms other than settlement terms; and 4) adopt policies encouraging the more liberal use of ISR to WTO and non-WTO countries by carriers that control less than 5% of the traffic on a particular route.

Respectfully submitted,

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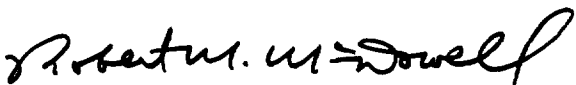
CERTIFICATE OF SERVICE

I, Robert M. McDowell, do hereby certify that on this 16th day of October, 1998, I have served a copy of the following document via messenger to the following:

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